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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. BRONSON MOON LEWIS, Defendant and Appellant.	A145229 (Humboldt County Super. Ct. No. CR1201331)

Bronson Moon Lewis (appellant) appeals from a judgment entered after a jury found him guilty of corporal injury to a spouse/cohabitant (Pen. Code, § 273.5, subd. (a))[1] and the trial court placed him on probation for three years. He contends the court erred in not instructing the jury with a lesser included offense. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On November 7, 2012, an information was filed charging appellant with corporal injury to a spouse/cohabitant (§ 273.5, subd. (a)). On April 8, 2013, after a jury trial, the jury announced it was deadlocked, and the trial court declared a mistrial. Appellant's second jury trial began on March 9, 2015.

The incident that led to the filing of the information occurred in 2011. Appellant and Antoinette Hunsucker had been in a relationship for over ten years, and the two had

[1]All further statutory references are to the Penal Code.

four children together. They lived together for most of the ten-year-period, until appellant moved out of the family home in July 2011. Between then and November 2011, appellant visited several times.

In the early morning of November 7, 2011, appellant came to the home and pounded on the door, refusing Hunsucker's request to leave. Eventually, in an attempt to prevent appellant from waking their children, Hunsucker let appellant inside. After the two "exchanged some words," they went to sleep.

The next morning, Hunsucker asked appellant to leave. She then went outside and noticed that appellant, who had driven to the home in a Chevrolet Colorado, had placed some of his belongings inside a Toyota 4Runner that had been parked in her driveway. Afraid that appellant intended to move back in, Hunsucker told him she wanted him to remove his property from the Toyota. When he refused, she attempted to remove them herself.

As Hunsucker tried to pull one of appellant's bags out of the Toyota, appellant wrestled with her "to try to shut the door as well as get the bag away from [her]." After appellant shut the door, Hunsucker tried to open it again. As she did so, appellant grabbed the back of her head and slammed it into the side mirror. Hunsucker fell to the ground and felt blood running down her face. She suffered lacerations to her face and bumps and bruises on her cheek, and an injury to her nose that was still scarred at the time of trial.

Hunsucker then got up and picked up one of the children's aluminum "T-ball" bats and hit appellant in the arm with it as he tried to approach her. Appellant went back inside and grabbed their baby, and stood on the front porch with the baby and their two daughters. Hunsucker yelled at appellant to leave, grabbed a knife because she could not find her cell phone to call the police, and I told him that if he did not put the baby down and leave, she "was gonna hurt his truck." Appellant eventually left the scene.

A Ferndale police officer who responded to the home testified that he observed Hunsucker with a swollen eye, a laceration on her nose, and blood on her shirt. Hunsucker told him that appellant grabbed the back of her head and slammed it into the Toyota's side mirror.

Hunsucker described a prior incident that occurred on April 29, 2003. She and appellant got into an argument, during which Hunsucker swung a camera at appellant and appellant put his hand over Hunsucker's face and forced her to the ground. Hunsucker sustained injuries to her face and lips and had bruises on her body. Neighbors called the police, and a deputy who arrived at the scene found appellant on top of Hunsucker, holding her down. Hunsucker testified she may not have told police exactly how the events unfolded because she wanted to protect appellant. Hunsucker described a second incident that occurred on May 22, 2004, when, during an argument, appellant threw his truck keys at Hunsucker, striking her and causing her to sustain scratches and bruises to her back.

Appellant testified that he began seeing someone new shortly after Hunsucker gave birth to the couple's fourth child in July 2011. He went back and forth between his home and the other woman's home, and told Hunsucker that he and the other woman were "just friends." On the morning of November 7, 2011, Hunsucker angrily showed him a picture she had found of appellant and the other woman kissing. Hunsucker began hitting appellant with her phone and calling him names, then went outside and started to throw his belongings out of the Toyota. He "walked up to her and told her to knock it off." The two "struggled" over some of his belongings; he denied smashing her face into a mirror.

Appellant further testified that Hunsucker then found their son's "little play bat" and chased him around the yard with it, swinging it at him, eventually hitting him in the arm and causing him to fall to the ground. She also found a knife, likely inside his Chevrolet, and swung it around at him and at the Chevrolet. Before leaving, he saw that

Hunsucker had "a small gash on her nose and it was bleeding." He did not know how she sustained that injury but "assumed it was during the time that she was smashing the window and doing damage" to his Chevrolet.

As to the prior incidents, appellant acknowledged he pleaded to a misdemeanor domestic violence charge as a result of the April 29, 2003 incident. He testified that Hunsucker struck him with a camera, then hit him in the face, and that the two "kind of started wrestling around." They "ended up in the back room," and he believed she must have injured herself, because "all I can remember is she was slamming her face off of an entertainment center and I was trying to get her to stop doing it." As to the May 22, 2004 incident, appellant admitted he threw his keys at Hunsucker and said he did so because she blocked the door as he tried to leave.

The jury found appellant guilty as charged. The trial court placed appellant on probation for three years with various conditions, including that he serve 120 days in county jail.

DISCUSSION

Appellant contends the trial court erred by refusing to instruct the jury on the lesser included offense of section 243, subdivision (e)(1)—battery against a spouse/cohabitant. We conclude that any error was invited.

The trial court has a sua sponte duty to instruct on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present and there is evidence that would justify a conviction of such a lesser offense. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1232, abrogated on other grounds by *People v. Diaz* (2015) 60 Cal.4th 1176, 1190–1191.) Section 243, subdivision (e)(1), which makes it unlawful for a person to commit battery against a spouse/cohabitant, is a lesser included offense of section 273.5, subdivision (a), which, in addition to requiring a battery against a spouse/cohabitant, requires that the person inflict "corporal injury

resulting in a traumatic condition" to the victim.[2] (*People v. Jackson* (2000) 77 Cal.App.4th 574, 575.) Thus, if there was evidence justifying a conviction for section 243, subdivision (e)(1), the court had a duty to instruct on that offense.

A defendant, however, "may not invoke a trial court's failure to instruct on a lesser included offense as a basis on which to reverse a conviction when, for tactical reasons, the defendant persuades a trial court not to instruct on a lesser included offense supported by the evidence. [Citations.] In that situation, the doctrine of invited error bars the defendant from challenging on appeal the trial court's failure to give the instruction." (*People v. Barton* (1995) 12 Cal.4th 186, 198.) For the invited error doctrine to apply, "the record must show only that counsel made a conscious, deliberate tactical choice between having the instruction and not having it. . . . If . . . the record shows this conscious choice, it need not additionally show counsel correctly understood all the legal implications of the tactical choice. Error is invited if counsel made a conscious tactical choice." (*People v. Cooper* (1991) 53 Cal.3d 771, 831.)

Here, we need not—and will not—decide whether the evidence warranted an instruction on section 243, subdivision (e)(1), because even if there was error, appellant is barred from asserting it under the invited error doctrine. (*People v. Bunyard*, *supra*, 45 Cal.3d at pp. 1234–1236.)

The trial court in this case first noted that the parties had discussed the "lesser offenses to the 273.5(a)" and that "both counsel were of the position that [there was] no evidence that the offense was less than what . . . was charged, if they believe that that happened . . . that there's no evidence . . . the listed victim was not the former co-habitant . . . or that she didn't suffer this cut. That's all there. So, the Court doesn't have

[2]The "traumatic condition" can be "a wound, or external or internal injury . . . , whether of a minor or serious nature, caused by a physical force." (§ 273.5, subd. (d); *People v. Abrego* (1993) 21 Cal.App.4th 133, 137 [minor injuries such as bruises suffice to constitute a "traumatic condition"].) Appellant does not dispute that the injuries Hunsucker suffered to her face constituted a "traumatic condition."

to give lessers if there's no evidence from which the jury . . . could conclude the lesser offense but not the greater was committed and that seems to be the state of the case. It either happened or it didn't happen as is alleged here. Neither counsel are requesting and asking the Court not to give any lessers. [¶] Is that correct?"

The prosecutor stated, "Yes. The People will withdraw our request of all the lessers that we had discussed." Defense counsel stated, "Yes, that is correct. Even more of a problem is that by giving the instruction, the jury might get confused about whether they were being invited to evaluate the entire incident to see if there was any nontraumatic injury, batteries, that occurred. The People, I understand, they're not going to argue that. They're not going to press that as a reason for a conviction and, therefore, the lesser included of the battery, in my mind, would do more harm to the case than leaving them out because otherwise, instructions on a unanimous verdict of facts and I would have to spend some time in my closing argument to try to instruct the jury." Noting that "that has not been the People's theory in this case," the court stated, "I'm in agreement and the Court will not be giving the lesser[s] that are not being requested."

Defense counsel's statements reflect his concern that the giving of instructions on lesser included offenses would provide the jury with more opportunities to convict appellant of a crime, because it could lead the jury to believe it was "being invited to evaluate the entire incident to see if there was any nontraumatic injury, batteries, that occurred." In other words, even if the evidence was insufficient to convict appellant of smashing Hunsucker's face into a mirror and causing her to sustain a "traumatic condition," a jury could nevertheless try to convict him of an offense by looking at the entire struggle that occurred and finding he battered Hunsucker (without causing a "traumatic condition") at some point during that struggle. Given defense counsel's agreement that there was no evidence to support an instruction on any lesser included offenses, and his recitation of the tactical reasons for not wanting the instructions to be given, we conclude that any error in the trial court's decision not to give the instructions

was invited. (See *People v. Avalos* (1984) 37 Cal.3d 216, 229 [a deliberate tactical motive precludes a defendant from asserting this error as a basis for a reversal of his conviction]; *People v. Hardy* (1992) 2 Cal.4th 86, 184 [trial court was not required to deliver an instruction where the defendant objected to an instruction that was inconsistent with its position that he did not commit the crime at all].) Appellant may not now complain that the court did exactly what he insisted upon. (*People v. Bunyard*, *supra*, 45 Cal.3d at p. 1235.)

Appellant asserts the invited error doctrine does not apply in his case because the trial court failed to obtain a personal waiver from him regarding the giving of the lesser included offense instructions.[3] His assertion is unavailing. "[W]e have never required a personal waiver before applying the invited error doctrine." (*People v. Cooper*, *supra*, 53 Cal.3d at p. 827.) In *People v. Cooper*, the Supreme Court held that although the trial court, out of an abundance of caution, took the defendant's personal waiver before deciding it would not give instructions on lesser included offenses, a personal waiver was not necessary for the invited error doctrine to apply. (*Ibid*.) That the court here did not obtain appellant's personal waiver does not preclude the application of the invited error doctrine.

DISPOSITION

The judgment is affirmed.

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[3]Appellant relies primarily on an Illinois case in which the Illinois Supreme Court noted that the decision whether to seek instructions on lesser included offenses is one to be made "by the defendant after full consultation with defense counsel," and held that the defendant in the case was denied his right to effective assistance of counsel because counsel failed to adequately present facts to him to allow him to make an informed decision about whether to pursue the instructions. (*People v. Brocksmith* (1994) 237 Ill.App.3d 818, 827–828 [604 NE 2nd 1059, 1066–1067.) The case did not address whether a personal waiver from the defendant must be obtained before the invited error doctrine can be applied.

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McGuiness, P.J.

We concur:

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Siggins, J.

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Jenkins, J.